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No. 256

IN THE

Supreme Court of the United States

ADELHEIT VON HARDENBERG and IRMGARD VON ALTEN,
Petitioners,

vs.

NICHOLAS DeB. KATZENBACH, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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INDEX

	PAGE
Citation to opinion below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement of the case	3
How this case presents a federal question	3
The trust established by petitioners' great-grandmother — 1873	3
The *Orme* case — 1943	4
The Attorney General's vesting of petitioners' remainder interest in their great-grandmother's trust — 1949	4
The final decree of the trial court in the *Orme* case — 1959	5
The appeals in the *Orme* case — 1959-1962	6
The trustee's suit for instructions — 1950-1966	7
The passage of Public Law 87-846, and defendants' motion for summary judgment	9
Reasons relied on for the allowance of the writ	11
I. The Appellate Court of Illinois has decided a novel and important federal question not heretofore determined by this Court or any other federal court	11

PAGE

II. The holding of the Appellate Court of Illinois that the Louise deHaven share had "vested in possession in" the Attorney General prior to December 31, 1961 is in direct conflict with the applicable decisions of this Court 12

A. The status of the Louise deHaven share of the Bigelow Trust on December 31, 1961 13

B. Petitioners' share of their great-grandmother's trust was not "vested in possession in" the Attorney General as of December 31, 1961 14

C. The decision of the Illinois Appellate Court conflicts with several decisions of this Court construing a similar post-war statute 17

III. The legislative history of P.L. 87-846 supports petitioners' position 23

Conclusion 26

Appendix A ..... App. 1

Appendix B ..... App. 11

TABLE OF CASES

PAGE

Estate of Hogemann, 45 Cal. Rep. 149, 403 P. 2d 405 (1965), reversing 41 Cal. Rep. 246 (D.C. App. 1964) 11, 12, 22, 23

Kahn v. United States, 257 U.S. 244 (1921) 21

McCoach v. Pratt, 236 U.S. 562 (1915) 20

Northern Trust v. Biddle, et al., 65 Ill. App.2d 253, 212 N.E.2d 694 (1st Dist. 1965) .....1, 2, 7, 8, 9, 10, 12, 13, 14, 15, App. A, App. B

Orme v. Northern Trust, 410 Ill. 354, 102 N.E.2d 335 (1951), cert. denied 342 U.S. 921 (1952) 4, 5

Orme v. Northern Trust, 29 Ill. App.2d 75, 172 N.E.2d 413 (1961), 25 Ill.2d 151, 183 N.E.2d 505 (1962), cert. denied 371 U.S. 935 (1962) 6, 7, 8, 12, 14, 15, 20, 21, 22, 24

Simpson v. United States, 252 U.S. 547 (1920) 21, 22

United States v. Fidelity Trust Co., 222 U.S. 158 (1911) 18

United States v. Jones, 236 U.S. 106 (1915) 18, 19, 20

United States v. The Schooner Peggy, 1 U.S. 256 (1802) 15, 16

Uterhart v. United States, 240 U.S. 598 (1916) 20

Vanderbilt v. Eidman, 196 U.S. 480 (1905) 18

Other Authorities

PAGE

14 Fed. Reg. 1660 and 2227 4

107 Cong. Rec. 465, 856 23

108 Cong. Rec. 15856, 19196-19197, 19227-19228, 21900, 22249 ..... 11, 23, 24, 25

Trading With The Enemy Act (50 U.S.C. App. §§ 1 et seq. 2, 4, 9, 11, 12, 13, 15, 16, 17, 18, 22, 23, 24

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST DISTRICT

Adelheit von Hardenberg and Irmgard von Alten pray that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First District, entered in the above-entitled case on December 9, 1965.

Citation to Opinion Below

The Circuit Court of Cook County, Illinois denied petitioners' motion for summary judgment, without opinion. The opinion of the Appellate Court of Illinois, First District, printed in Appendix A hereto, is reported in 65 Ill. App. 2d 253, 212 N.E. 2d 694.

Jurisdiction.

On December 9, 1965, the Illinois Appellate Court, First District, Third Division, filed its opinion affirming the denial of defendants' motion for summary judgment. On March 22, 1966, the Illinois Supreme Court denied petitioners' petition for leave to appeal. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

Questions Presented

1. Was the interest of petitioners in the Bigelow Trust "vested in possession in the Attorney General prior to December 31, 1961" so as to avoid the divestiture provisions of the 1962 amendment to the Trading With the Enemy Act?

2. Did the pendency on December 31, 1961 of litigation involving substantial claims as competing claims to ownership of a one-third interest in the Bigelow Trust prevent that interest from being "vested in possession in the Attorney General"?

Statute Involved

Public Law 87-846, passed by the United States Congress in 1962 is the crux of this case. This law added section 40(a) to The Trading With The Enemy Act (50 U.S.C. App. § 41) which provides in pertinent part:

> "Subject to the provisions of subsection (b) hereof, all rights and interests of individuals in estates, trusts, insurance policies, annuities, remainders, pensions, workmen's compensation and veterans' benefits vested under this Act after December 17, 1941, which have not become payable or deliverable to or have not vested in possession in the Attorney General prior to December 31, 1961, are hereby divested; *provided,* that the provisions of this section shall not affect the right of the Attorney General to retain all such property rights and interests and to collect all income which is payable to or vested in possession in him prior to December 31, 1961."

STATEMENT OF THE CASE

How This Case Presents A Federal Question

The jurisdiction of this Court is invoked by a writ of certiorari due to petitioners' assertion of rights and title to certain property under the Statutes of the United States.

The Trust Established By Petitioners' Great-Grandmother—1873

Louisa Bigelow (petitioners' great-grandmother) by her will established a trust for her three granddaughters—Josephine Caldwell, Sarah DeHaven and Louise DeHaven (petitioners' mother). The corpus of the trust consisted of certain real estate located in the heart of downtown Chicago as well as other assets. Louisa Bigelow died in 1873. (A. 1, 28-33.)

Petitioners are citizens and residents of Germany. Petitioners' mother, Louise DeHaven, was a native and citizen of the United States who resided in this country from the end of World War I until her death in 1941.

The will of petitioners' great-grandmother provides that the income from the trust is to be paid to petitioners' mother and two aunts during their lifetimes and upon the death of the last of them, one-third of the corpus of the trust is to go to the children or heirs of each of Louisa Bigelow's grand-daughters. (A. 30-31.)

Petitioners' mother, Louise DeHaven, died in 1941. Petitioners' aunts, Josephine Caldwell and Sarah DeHaven, died in 1919 and 1951 respectively. (A. 44-45.)

The Orme Case — 1943

In 1943, two years after the death of petitioners' mother, an action was brought by Eugene Orme to construe her will. Orme claimed that he (and not petitioners) was entitled to one-third of the trust created by petitioners' great-grandmother. Petitioners and the other descendants of Louisa Bigelow were made defendants in this action by Orme. (A. 147.)

In 1944, one of these defendants, Raymond DeHaven, filed a counterclaim in the *Orme* litigation in which he claimed that he was entitled to one-third of that portion of the Bigelow trust payable to Louise deHaven's heirs. (A. 147.)

The *Orme* litigation dragged along through the years. Not until December 10, 1962 were all of the issues involved in the case finally determined.

The Attorney General's Vesting of Petitioners' Remainder Interest In Their Great-Grandmother's Trust —1949.

On March 29 and April 27, 1949, by virtue of the authority granted him under § 8(c) of the Trading With The Enemy Act (50 U.S.C. App. § 7), the Attorney General of the United States issued orders (14 Fed. Reg. 1660 and 2227) "vesting" in himself the interests which petitioners claimed in the trust created by their great-grandmother. (A. 82-83.)

On May 23, 1949, the Attorney General of the United States petitioned the court in the *Orme* litigation requesting, on the basis of his prior vesting orders, that he be substituted in lieu of petitioners as a defendant in that litigation. Petitioners resisted the Attorney General's attempt to take their place in the *Orme* case, arguing that the Attorney General had no authority to seize their interests under the Trading With The Enemy Act because the war with Germany had long since ceased. (A. 147.)

On November 9, 1950, the trial judge entered an order permitting the Attorney General to replace the petitioners as defendants in the *Orme* case. Petitioners appealed this order to the Supreme Court of Illinois and on November 27, 1951, the Supreme Court of Illinois affirmed the order holding (*inter alia*) that a technical state of war still existed with Germany because no peace treaty had been signed and that therefore the Attorney General was still empowered to exercise the seizure power vested in him over the property belonging to those who were still technically the enemies of this country. (410 Ill. 354, 102 N.E. 2d 335.) Thereafter, on April 7, 1952, this Court denied petitioners' petition for writ of certiorari, (342 U.S. 921.) (A. 148.)

The Final Decree of the Trial Court In the Orme Case — 1959

Eventually, the *Orme* case was referred for a hearing to a Master in Chancery. In 1957, the Master filed his report on the merits of the controversy and in 1958 his report as to attorneys' fees was filed. On March 2, 1959, the Chancellor entered a final decree. This decree rejected both Eugene Orme's claim to all of petitioners' share of their great-grandmother's trust and Raymond DeHaven's claim to one-third thereof. The decree further construed Louisa Bigelow's will to mean that each of her three granddaughters (petitioners' mother and two aunts) received a life estate in trust and that upon the death of the last of the three granddaughters (1951), the children of each of the granddaughters (including petitioners) were entitled to receive and divide one-third of the trust assets *per stirpes*. (A. 135-139, 163-164.)

The Chancellor further decreed that the Attorney General of the United States, by virtue of his prior vesting orders, was to receive petitioners' interest in the trust. (A. 136-137.)

The trustee was prohibited, however, from making any distribution of the trust assets or accumulated income, ". . . pending the entry of a final decree in this cause [the *Orme* case] and shall make distribution upon the entry of and in accordance with a final decree or decrees in the *Biddle* suit [the case here at bar] in the amounts as shall be finally determined in and by such decree or decrees and upon determination of the validity, amount and rank of liens, if any, which have been asserted and remain unsatisfied against said interests in said *Biddle* suit, as shall be finally determined in and by such decree or decrees therein, and upon approval of the trustee's final account therein." (A. 135-139, 163-164.)

The Appeals In The Orme Case — 1959-1962.

Following the entry of the trial court's decree in the *Orme* case, Eugene Orme, petitioners, Raymond deHaven, and others perfected appeals to the Appellate Court of Illinois asking that the trial court's decree be modified or reversed. Petitioners argued on appeal that although the Attorney General's seizure order may have been valid due to the technical state of war existing with Germany, their interest in their great-grandmother's trust was not within the scope of his (the Attorney General's) vesting order. The Appellate Court of Illinois affirmed the decision of the Circuit Court on January 9, 1961 (29 Ill. App. 2d 75, 172 N.E.2d 413.) The Illinois Supreme Court granted leave to appeal. Thereafter, on May 25, 1962, the Supreme Court affirmed. (25 Ill. 2d 151, 183 N.E.2d 505.) (A. 149-150.)

On July 13, 1962, the Supreme Court of Illinois entered an order staying its mandate in the *Orme* case insofar as

it directed the distribution of one third of petitioners' great-grandmother's trust to the Attorney General of the United States, until final disposition of petitioners' petition for a writ of certiorari. The trial court thereafter entered a similar order prohibiting distribution. (A. 150-151.)

This Court denied petitioners' petition for a writ of certiorari on December 10, 1962. (371 U.S. 935 (1962)).

The Trustee's Suit For Instructions — 1950-1966.

The case at bar was brought in 1951 by the Northern Trust Company, as trustee of the Bigelow Trust. In this suit the trustee sought interpretation of the Bigelow will, instructions as to the administration of the trust, and permission to sell certain trust assets. (A. 1-28.) (This suit was entitled below as *Northern Trust Co.* v. *Biddle, et al.*)

Petitioners were made defendants and filed an answer to the complaint. No attempt has ever been made to remove or replace petitioners as parties defendant in this case. (A. 43-54.)

Later in the year 1951, the trustee filed a supplemental complaint which alleged (*inter alia*) (A. 49):

> "38. The doubts, uncertainties and problems which are presented as to distribution of the assets of the Bigelow Trust should be resolved and determined in this proceeding, insofar as the same are not determinable in the *Orme* Suit, and the time for the distribution of the Bigelow Trust having now arrived, distribution should be made as expeditiously as possible *after the parties entitled thereto are finally determined and the interests of the several beneficiaries should be conserved in the interim.*" (Emphasis added.)

As parties defendant, petitioners answered this supplemental complaint. (A. 55.)

The Attorney General of the United States also answered this supplemental complaint complaining that by reason of his seizure orders in the *Orme* litigation, petitioners' share of their great-grandmother's trust should be distributed to him. By way of a counterclaim, the Attorney General of the United States also sought (*inter alia*) a decree finding that petitioners' mother's share of the Bigelow Trust vested in petitioners upon the death of their mother in 1941 and that the Attorney General had succeeded to petitioner's rights in that property. (A. 59, 63-81.)

Raymond DeHaven, also a defendant, asserted by way of counterclaim his claim to one-third of petitioners' share of the trust. (A. 89-90.)

The *Biddle* case made little progress through the years, chiefly because the parties were awaiting the outcome of the *Orme* litigation.

In July 1962, after the Supreme Court of Illinois had affirmed the trial court's decree in the *Orme* case, but before petitioners' petition for a writ of certiorari was ruled upon by this Court in that case, the trustee filed a second supplemental complaint in the *Biddle* case in which the chronology of events was brought up to date for the court and permission was sought to distribute the shares of petitioners' great-grandmother's trust which had been willed to the children and heirs of petitioners' aunts Josephine Caldwell and Sarah DeHaven. In this second supplemental complaint, the trustee pointed out that to that date no distribution could yet be made of petitioners' mother's share of the Bigelow Trust because the pendency of petitioners' petition for a writ of certiorari before this Court in the *Orme* litigation. (A. 132, par. 8.)

In August of 1962, the Attorney General of the United States filed an answer to this second supplemental complaint, in which he requested (*inter alia*) (A. 144):

> "(c) That this Court determine the quantum of interest in the said trust estate distributable under the terms of the Bigelow will to the children of Louise DeHaven [petitioners' mother] and direct the trustee to make distribution of such share to the persons determined to be entitled thereto upon final determination of the litigation with respect to such share [*viz.*, the *Orme* litigation]."

The Passage of Public Law 87-846, and Defendants' Motion For Summary Judgment.

On May 1, 1963, petitioners filed a motion for summary judgment in the case at bar (the *Biddle* case). The motion is based upon that part of Public Law 87-846, which took effect on October 22, 1962, and which amends Section 40 of The Trading With The Enemy Act and dictates the return of certain previously "vested" interests to their rightful alien owners. (A. 146-152.)

The 1962 amendment is set forth in full at page 2 above. It provides that previously vested interests are divested, if the interests "have not become payable or deliverable to or have not vested in possession in the Attorney General prior to December 31, 1961 . . ."

It is this law which petitioners contend dictates the return of their previously seized property. The correct interpretation of this amendment, an act of legislative amnesty, is the single but important question raised by petitioners for review by this Court.

The Circuit Court of Cook County, Illinois denied defendants' motion for summary judgment. (A. 152.) In the final decree entered by the trial court, the trustee was directed to distribute petitioners' share of the Bigelow Trust ("Distribution Fund B", approximately $725,000) to the Attorney General of the United States. (A. 170-171.)

Petitioners thereafter prosecuted an appeal from this final decree as to (*inter alia*) the denial of their motion for summary judgment. (A. 174.) On December 9, 1965, the Illinois Appellate Court, First District, Third Division, filed its opinion (Appendix A to this Petition) affirming (*inter alia*) the denial of defendants' motion for summary judgment (Appendix B to this Petition).

On February 2, 1966, petitioners filed their petition for leave to appeal to the Supreme Court of Illinois. On March 22, 1966, the Supreme Court of Illinois denied the petition.

Thereafter, on March 28, 1966, petitioners filed in the Appellate Court of Illinois their motion for a stay of that court's mandate until June 20, 1966 pending their preparation and filing of this petition for a writ of certiorari, which motion was granted on March 31, 1966.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

THE APPELLATE COURT OF ILLINOIS HAS DECIDED A NOVEL AND IMPORTANT FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT OR ANY OTHER FEDERAL COURT.

On October 22, 1962, the President of the United States signed Public Law 87-846—an amendment to The Trading With The Enemy Act—into law. The amendment originated in the Senate and after a conference was passed by both houses. (108 Cong. Rec. 19227-19228, 21900.) The debates on the amendment in the Senate of the United States clearly demonstrate the congressional conclusion that continuation of the United States' program of seizing and holding property situated in this country belonging to former enemy aliens would be wasteful of administrative resources and inconsistent with our current foreign policy, aid programs and valued alliances. (108 Cong. Rec. 19196-19197, 22249.)

Neither this Court nor any other Federal Court has ever had occasion to construe this particular amendment. Indeed, the case at bar is only the second reported case in the country which deals with Public Law 87-846. The other case is *Estate of Hogemann*, 45 Cal. Rep. 149, 403 P. 2d 405 (1965), reversing 41 Cal. Rep. 246 (D.C. App. 1964).

The diametrically opposed opinions of the intermediate and Supreme Courts of California in the *Hogemann* case, as well as the split of opinion among the justices of the

California Supreme Court, illustrate the unique and difficult nature of the legal questions involved.

The ultimate question is, of course, the intent of Congress in using the words "vested in possession in" in the 1962 amendment to The Trading With The Enemy Act.

The Appellate Court of Illinois has taken the position that Congress intended to continue the wartime program of expropriation of property interests situated as petitioners' interests were on December 31, 1961. Petitioners, on the other hand, contend that Congress intended to return their property to them.

This issue is of widespread significance. Involved here are the relations between the United States and several of its closest allies. We submit that the interpretation of this remedial amendment to the confiscatory Trading With The Enemy Act is deserving of the attention of this Court.

II.

THE HOLDING OF THE APPELLATE COURT OF ILLINOIS THAT THE LOUISE deHAVEN SHARE HAD "VESTED IN POSSESSION IN" THE ATTORNEY GENERAL PRIOR TO DECEMBER 31, 1961 IS IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

Petitioners contend that the pendency of the *Orme* case and the instant litigation prevented their share of their great-grandmother's trust from becoming "vested in possession in" the Attorney General of the United States on the statutory cut-off date, December 31, 1961.

The Appellate Court of Illinois rejected this contention, apparently adopting the position of the Attorney General that (Atty. Gen.'s Br. p. 14):

". . . the purpose of the statute was to divest interests as to which it was not possible, at the cut-off date, *to engage in litigation directed toward reduction to possession.*" (Emphasis added.)

We submit this construction of the recent amendment is erroneous, and defeats the chief purpose of the amendment.

A.

The Status of the Louise deHaven Share of the Bigelow Trust On December 31, 1961.

On December 31, 1961, the cut-off date specified in the amendment to The Trading With The Enemy Act, the following factors precluded the Attorney General from collecting the Louise deHaven Share of the Bigelow Trust:

(1) Eugene Orme claimed that he was entitled to the entire Louise de Haven Share. This claim had not been finally adjudicated, the *Orme* case was then pending and awaiting oral argument in the Supreme Court of Illinois.

(2) Raymond de Haven's claim to one-third of the Louise de Haven Share was likewise undetermined, and awaiting decision in the *Orme* case.

(3) The effect of the Attorney General's order "vesting" the Louise de Haven Share was also undetermined. Petitioners contended in the Illinois Supreme Court that the vesting order did not include their remainder interest in their great-grandmother's trust.

(4) The trustee still had possession of the Louise de Haven Share of the Bigelow Trust and there was no court order directing the trustee to make any distribution to the Attorney General. In fact, the *Orme*

decree (then on appeal) specifically postponed distribution until entry of an appropriate decree in the case at bar, which had not yet been entered.

Moreover, on June 20, 1962 and July 13, 1962—six months after the cut-off date—orders were entered in the *Orme* case by the trial and Illinois Supreme courts specifically prohibiting distribution of petitioners' share of the trust until all avenues of appeal had been exhausted.

B.

Petitioners' Share of Their Great-Grandmother's Trust Was Not "Vested In Possession In" the Attorney General As of December 31, 1961.

It is undisputed that the words "vested in possession" as used in this amendment, mean "a right of present enjoyment." In fact, the Appellate Court of Illinois expressly adopted this definition. (App. A, p. 6.)

The amendment requires that the interest in question be vested in possession *in the Attorney General of the United States;* that is, as of December 31, 1961, *the Attorney General* must have had a fixed right of present enjoyment.

It is clear that due to the pendency of the *Orme* litigation, neither the Attorney General, nor petitioners, nor for that matter Eugene Orme or Raymond de Haven, had a right to present enjoyment of the interests in question on December 31, 1961.

It is significant that the Attorney General never sought to obtain possession of that share prior to the cut-off date. He could not have done so, by reason of the uncertainties presented by the competing claims in the *Orme* litigation

and the express provisions of the court orders prohibiting distribution of that share to the Attorney General or to anyone else.

All of the parties to both the *Orme* suit and the instant litigation were aware that until the final adjudication of the rights of the competing parties to the *Orme* case, it would be unclear as to precisely who was entitled to the assets in question.

The Appellate Court of Illinois, however, took the position in its opinion that the final judicial determination of rights by the Illinois Supreme Court in 1962 and the action of this Court in denying petitioners' petition for a writ of certiorari, relate back to the time when, under the will of petitioners' great-grandmother, the corpus of the trust was made distributable—in 1951 (App. A, pp. 9 to 10):

> "... The construction of the instrument creating the right may require the aid of a court, and litigation may postpone the actual custody or enjoyment of the right and *may be necessary to determine the identity of the holder of the right,* but the right of present enjoyment is fixed when the precedent estate determines." (Emphasis added)

This reasoning is erroneous. The amendment to The Trading With The Enemy Act specifically requires that the interest be vested in the possession *in the Attorney General of the United States,* not merely that it be a present right in an abstract legal sense. This requirement was not met until the final judicial determination of the competing claims in the *Orme* litigation. Under the rule of *United States* v. *The Schooner Peggy,* 1 U.S. 256 (1802), that final judicial determination in 1962 cannot be said to relate back, insofar as the divesture amendment to The Trading With The Enemy Act is concerned, to the date on which the last life tenant of the trust died.

In the *Peggy* ease, a French ship had been seized pursuant to war-time regulations. A lower court ordered that the ship be condemned, and the owners appealed to this Court. While the appeal was pending, the United States signed a treaty with France providing (*inter alia*) for restoration of ships not "definitively condemned" prior to the effective date of the treaty. In holding for the appellant, this Court stated (1 U.S. at 257, 258):

> "The terms used in the treaty seem to apply to the *actual condition of the property, and to direct a restoration of that which is still in controversy between the parties.* . . . In this case the sentence of condemnation was appealed from. It might have been reversed, and therefore was not such a sentence as in the contemplation of the contracting parties, on a fair and honest construction of the contract, was designated as a definitive condemnation.
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> "It is in general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. *But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.*" (Emphasis added.)

Similarly, in the case at bar, the amendment to The Trading With The Enemy Act applies to the "actual condition" of the interest in question as of the cut-off date. In the case at bar, as in the *Peggy* case, the property in question was still involved in controversy between the parties and the case was pending on appeal when the amendment became effective. Subsequent to the judgment of the trial court, but before the decision of the Illinois Supreme Court, a law intervened and positively changed the rule which governs. This law, it is submitted, should be obeyed.

At issue here is the effect of an act of legislative grace which cuts across pending controversies at a certain point in time, divesting the Attorney General of all interests to which he did not have a *fixed right* of present enjoyment at that point in time.

If the Appellate Court's ruling is left undisturbed, the recent amendment to the Trading With The Enemy Act will to a large extent be nullified. That amendment, on its face, contemplates something more than the issuance of a "vesting order" for the Attorney General to avoid divesture; otherwise the amendment would be meaningless. That something more is the establishment in the Attorney General, on or before December 31, 1961, of an *uncontested* right to present enjoyment of the interests or property which he had previously vested.

C.

The Decision of the Illinois Appellate Court Conflicts With Several Decisions of This Court Construing a Similar Post-War Statute.

In 1898, the Congress of the United States enacted a statute which taxed certain estates in order to provide revenue for the Spanish-American War. When the war ended, the taxing provisions were repealed. This repealer section is similar in many respects to the amendment to The Trading With The Enemy Act involved in the case at bar. Section 3 of the repealing act (32 Stat. 406) provided that the Secretary of the Treasury was to refund to applicants who had paid taxes under the repealed statute:

> "...so much of said tax as may have been collected on contingent beneficial interests *which shall not have become vested prior to July 1, 1902.* And no tax shall hereafter be assessed or imposed under said act . . .

upon or in respect of any contingent beneficial interest *which shall not become absolutely vested in possession or enjoyment prior to said July first*, nineteen hundred and two." (Emphasis added.)

Subsequent to the passage of this Act, this Court held that the cut-off for refunds must be equivalent to the cut-off for collection, and therefore any tax collected on an interest which had not "absolutely vested in possession or enjoyment" before the cut-off date would be refunded. *Vanderbilt* v. *Eidman*, 196 U.S. 480, 500 (1905); *United States* v. *Fidelity Trust Co.*, 222 U.S. 158, 159 (1911); *United States* v. *Jones*, 236 U.S. 106, 110-111 (1915).

Here, a strikingly similar situation is presented—a refund of money collected during war-time where the affected property or interest had not become vested in possession as of a particular cut off date. The decisions of this Court discussed below concerned suits brought by the persons having paid the tax who claimed the right to a refund on the ground that their interests, upon which the tax had been collected, were not "absolutely vested in possession or enjoyment" prior to the statutory cut-off date. The similarity to the issues involved in petitioners' motion for summary judgment in this case is clear.

In *United States* v. *Jones*, 236 U.S. 106 (1915), the interest in question passed to the administrator before the cut-off date, but according to the law of Pennsylvania the administrator could not be compelled to make distribution for one full year thereafter, and he did not make a distribution for several months. Thus, the interests were clearly "vested" in the legatees, but were not distributed to them until after the cut-off date. This Court held that these interests were non-taxable because they did not become absolutely vested in possession or enjoyment "until the

daughters were entitled to receive their respective shares in the property remaining after the debts and expenses were paid, which was not until several months after July 1, 1902 [the cut-off date]." (236 U.S. at 111.) This Court said (236 U.S. at 112-114):

> "True, by that Act, the executor or administrator was required, before surrendering a legacy or distributive share to whoever was entitled to it, to pay the tax assessed thereon and to deduct the amount from the particular legacy or distributive share, but this did not mean that the tax was to be assessed or paid in the absence of a right to immediate possession or enjoyment. On the contrary, as was held in *Vanderbilt* v. *Eidman*, [196 U.S. 480], p. 499, *it imported the existence of 'a practically contemporaneous right to receive the legacy or distributive share.'* In that case it was said, after separately considering the several parts of the act (p. 495): '*In view of the express provisions of the statute as to possession or enjoyment and beneficial interest and clear value, and of the absence of any express language exhibiting an intention to tax a mere technically vested interest in a case where the right to possession or enjoyment was subordinated to an uncertain contingency,* it would, we think, be doing violence to the statute to construe it as taxing such an interest before the period when possession or enjoyment had attached.'
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> "Applying this statute to the facts before stated, we see no escape from the conclusion that the tax in question must be refunded. It was collected upon distributive shares which neither were nor could have been absolutely vested in possession or enjoyment prior to July 1, 1902. The intestate's death had occurred only three days before, no administrator had been appointed, *the debts and expenses had not been ascertained, what, if anything, would remain after their pay-*

ment was uncertain, and the time had not come when the daughters were entitled to a distribution." (Emphasis added.)

The italicized considerations in the last quoted paragraph were true to the Louise de Haven Share of the Bigelow Trust on December 31, 1961.

McCoach v. *Pratt,* 236 U.S. 562 (1915), was a case identical to *United States* v. *Jones,* except that the tax was collected on the legacies. The tax was likewise refunded.

In *Uterhart* v. *United States,* 240 U.S. 598 (1916), the will in question provided that the "executors and executrix and trustees shall not be compelled to make distribution of the principal of the estate or any part thereof, except in the exercise of their reasonable discretion, until the said Carl Stein attains the age of twenty-one years." (240 U.S. at 604.) This Court held that the tax collected on the principal must be refunded, since Carl Stein would reach twenty-one after the cut-off date and the interests would not be "absolutely vested in possession or enjoyment" until that time. (240 U.S. at 605)

By way of contrast, in the case at bar, the trustee was *prohibited* from distributing petitioners' share of their great-grandmother's trust until almost a year after the cut-off date of December 31, 1961, because of the pendency of the *Orme* litigation.

If, as this Court has held in the above cited cases, an interest in an estate is not "vested in possession" because the estate is still in the process of administration (the *Jones* and *McCoach* cases), or because the trustee has not exercised his discretion to make distribution (the *Uterhart* case), it follows *a fortiori* that an interest is not vested in possession where serious questions are presented in pending litigation as to who of several competing claimants is entitled to receive the interest.

It is instructive to compare the holdings of this Court in cases arising under the repealer of the Spanish-American War taxing statute wherein this Court held that the interests in question *had* vested in possession of the claimants and were therefore taxable.

In *Kahn* v. *United States,* 257 U.S. 244 (1921), the only reason advanced to defeat imposition of the tax was that the executor had failed to set up a trust fund as directed by the testator. This Court held (257 U.S. at 245):

> ". . . the mere failure of executors to establish the trust fund will not prevent vesting of this legacy, if under state law the time for payment has come, *the right thereto is uncontroverted,* and it is clear that the money retained will not be needed to satisfy an outstanding claims." (Emphasis added.)

In the *Kahn* case, this Court pointed out that as of the cut-off date ". . . *no pending controversy or outstanding claim could affect the value of any but the residuiary legacies; and these only to a slight extent.*" (257 U.S.at 246.) (Emphasis added.)

The contrast to the case at bar and to the decisions of this Court where refunds were ordered is clear. In this case, a "pending controversy" was in progress on the cut-off date in which two parties (Eugene Orme and petitioners) claimed the entire interest seized by the Attorney General, and another party (Raymond de Haven) claimed one-third of that interest. The Attorney General's right to immediate distribution of the assets, far from being "uncontroverted", was seriously challenged by three separate claimants.

In *Simpson* v. *United States,* 252 U.S. 547 (1920), this Court refused a refund based upon a finding that the interests in question were "absolutely vested in possession

or enjoyment" because at the time of the cut-off date, no "genuine obstacle" existed as to the heirs' present right to possession or enjoyment (252 U.S. at 552):

> "It is thus apparent that for many months prior to July 1, 1902, there were abundant assets with which to make payments upon the two legacies, in an amount larger than was necessary to make them equal to, and greater than, that for which they were assessed for taxation; *that for many months before that date it was the legal duty of the executors to make such payments, and that for a lifetime the legatees had a statutory right to institute suit to compel payment.*" (Emphasis added.)

In the case at bar, it was the legal duty of the custodian of the assets of the trust *not* to make payments or distribution thereof pursuant to the order of the trial and Supreme Courts of Illinois in the *Orme* case. Furthermore, none of the parties contending for the Louise de Haven Share of the trust—including the Attorney General—had a right (statutory or otherwise) to compel payment on December 31, 1961, and no such effort was ever made.

The holding of the Supreme Court of California is the only other case construing the 1962 amendment to The Trading With the Enemy Act, *Estate of Hogemann,* 45 Cal. Rep. 149, 403 P. 2d 405 (1965), is similar to the above cases decided by this Court wherein the tax refunds were denied.

In *Hogemann,* the appellants relied solely upon the absence, prior to the statutory cut-off date, of a decree of distribution as to their distributive shares of the estate. The decree of distribution as to their shares was withheld due to their "... request for additional time to investigate the 'continued effectiveness' of the [Attorney General's] vesting order." (403 P. 2d at 406.) The Supreme Court of California noted that the decedent's will was not at all

ambiguous and that the record "*. . . is devoid, in fact, of any dispute over either the identity or the shares of the German legatees.*" (403 P. 2d at 407.) (Emphasis added.)

In contrast, in the instant case, on December 31, 1961—the cut-off date prescribed by the amendment to the Trading With The Enemy Act—the decedent's will was ambiguous and was the subject of a vigorously contested will construction suit (the *Orme* case) in which the identity of the legatees entitled to share in the trust assets was a matter of substantial dispute. It is therefore clear that the interests could not have vested in the possession of the Attorney General prior to the effective date of the amendment and should be returned to petitioners pursuant to the mandate of Congress contained in P.L. 87-846.

III.

THE LEGISLATIVE HISTORY OF P.L. 87-846 SUPPORTS PETITIONERS' POSITION

In 1962, the 87th Session of Congress of the United States had under consideration several amendments to the Trading With The Enemy Act (H.R. 7283). Those originating in the House of Representatives and which ultimately passed the House did not contain any provisions similar to the amendment here in question. (108 Cong. Rec. 15856).

In the Senate, however, Senator Bible introduced S.495 which provided for the immediate return of all property previously seized by the United States Government during the Second World War, to any of the former enemy alien owners who had since acquired United States citizenship. (107 Cong. Rec. 856).

Senators Bush and Saltonstall also introduced S. 291, which contained the following section 40(a) (107 Cong. Rec. 465):

> "Except as provided by subsection (b) there is hereby divested any unliquidated interest (including any increase thereof) in the estate of any decedent who at the time of his death was a citizen or national of the United States, or in any trust the corpus of which is composed of assets provided by any individual who at the time of the creation of such trust was a citizen or national of the United States, which has been vested under this Act after December 17, 1941, and has not been reduced to possession by any officer of the United States or department or agency thereof."

On September 15, 1961, the Senate Judiciary Committee recommended passage of S. 495 as amended by S. 291. (87th Congress, 1st Sess., Senate, Calendar No. 1043, Report No. 1062.)

The obvious purpose of this amendment was to rectify what Senator Dirkson during the debate on the amendment characterized as "an unhappy situation to say the least," that is, some 17 years after V-J Day, there were in the Department of Justice some 41 people working on alien property. (108 Cong. Rec. 22249; Senate, October 4, 1962.) Senator Long of Louisiana read from Charles Dickens' "Bleak House" in order to dramatize his argument that, like *Jarndyce* v. *Jarndyce,* the Trading With The Enemy Act program had gone on far too long. Senator Long made the point that the long years of litigation, with attendant attorneys' fees and costs, were gradually consuming the funds which had been available for distribution. (108 Cong. Rec. 19196-19197.)

On March 21, 1962, then Deputy Attorney General Byron S. White wrote to the Chairman of the Senate Judiciary Committee concerning S. 291 (108 Cong. Rec. 19228). This letter proposed a change in the wording of Section 40(a); the suggested language is almost verbatim that of Section 40(a) as finally enacted.* The letter expresses the Department of Justice's endorsement of the objectives of the bill.

> "The reasons for this conclusion are, first, that there must be a point at which vesting must stop, as it already has with respect to property acquired after December 31, 1946; and second, that, with the passing years, the expense of collecting income payments and preserving remainder interest will become disproportionately large in relation to the value of the property to be taken in."

The letter goes on to suggest a change in the language of the amendment so that all interests which have not become "payable or deliverable to or have not vested in possession in the Attorney General prior to the effective date of this amendment" are divested and to be returned to their former owners. The Justice Department objected to the original language of the amendment returning all interests which had "not been reduced to possession by any officer of the United States or any department or agency thereof." Because, in the words of the then Deputy Attorney General ". . . the effect of the bill would be to return such undistributed interests to former enemy nationals, . . ."

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* The only difference is that Deputy Attorney General White suggested the cut-off as "prior to the effective date of this amendment," while the Act as passed establishes a cut-off date "prior to December 31, 1961."

* * * "... S. 291 would returns interests due the Attorney General, but not yet collected, . . ." The Department of Justice in this letter expresses their interest in preserving for the Attorney General all interests which were at the cut-off date distributable or collectible by the Attorney General but not yet "reduced to possession."

This letter was placed on record in the Senate. (108 Cong. Rec. 19228.)

The language of Section 40(a) as suggested by Mr. White (with the single exception noted above) was presented to the Senate as an amendment to S. 495, and was passed without debate on September 12, 1962 (108 Cong. Rec. 19227-28.)

After a conference, the House of Representatives agreed to the amendment passed by the Senate (108 Cong. Rec. 21900) and subsequently the bill was signed into law by the President of the United States on October 22, 1962.

From this legislative history it is clear that the amendment as finally approved was intended to direct the return of all previously vested interests except those which had become undisputedly payable or deliverable to the Attorney General, or clearly vested in his possession, on the cut-off date.

The decision of the Illinois Appellate Court in this case substantially nullifies this clearly expressed Congressional purpose.

Conclusion

The decision of the Illinois Appellate Court frustrates the Congressional purpose to correct the serious injustice which was perpetrated upon persons such as these two old German ladies, whose property was confiscated in 1949, long after any justifiable reason for vesting had ceased to exist.

The property of petitioners should not have been vested in the first place. In light of the peculiar phrasing of the law which permitted vesting of "enemy" property at a time when the United States and Germany were close allies, this Court should liberally construe the 1962 amendment to the Trading With The Enemy Act to the end that petitioners' property may at long last be returned to them.

Respectfully submitted,

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June 20, 1966

APPENDIX A.

Opinion of the Illinois Appellate Court, First District, Third Division, Filed December 9, 1965.

MR. JUSTICE SCHWARTZ delivered the opinion of the court.

This is an appeal by Adelheit von Hardenberg and Irmgard von Alten, who were resident German nationals, from a decree directing that the trustee under the will of Louisa G. Bigelow distribute to the Office of Alien Property of the Attorney General of the United States, as successor to the Alien Property Custodian, their share of a trust created by the said will. The authority of the Attorney General to take this property rests on the provisions of the Trading With The Enemy Act. It is admitted that the case comes within the purview of the act, but it is contended that a subsequent amendment divested the Attorney General of the right to take the property. This amendment, known as the divestiture act, was incorporated in Public Law 87-846, effective October 22, 1962, which added Section 40 to the Trading With The Enemy Act, 50 U.S.C.A.App. § 41. The principal issue is whether the language of the divestiture act which defined the property affected by it as those "rights and interests * * * which have not become payable or deliverable to or have not vested in possession in the Attorney General prior to December 31, 1961," covers the property here in question.

The facts involved herein have been set forth at length in prior litigation concerning the Bigelow will. *Orme* v. *Northern Trust Co.*, 410 Ill. 354, 102 N.E.2d 335; cert. denied *Von Hardenberg* v. *McGrath*, 343 U.S. 921, 72 S.Ct. 677, 96 L.Ed. 1334 (1952); *Orme* v. *Northern Trust Co.*, 29 Ill.App.

2d 75, 172 N.E.2d 413; 25 Ill.2d 151, 183 N.E.2d 505; cert. denied *Von Hardenberg* v. *Kennedy,* 371 U.S. 935, 83 S.Ct. 308, 9 L.Ed.2d 271 (1962). It will not be necessary to repeat them at any length. Louisa G. Bigelow died in 1873, creating in her will a trust of which The Northern Trust Company is now trustee. The will provided that the income from the trust was to be paid to her three grandchildren and to their heirs upon the death of each grandchild, but that no distribution was to be made of the corpus until the death of all three grandchildren, at which time one-third of the corpus was to go to the children or heirs of each grandchild. One grandchild died in 1919; Louise De Haven, another grandchild and the mother of appellants, died in 1941; and the last grandchild died in 1951. Appellants are the only children of Louise De Haven.

In 1943 an action to construe the will of Louisa G. Bigelow (hereinafter called the *Orme* case) was commenced in the Circuit Court of this County and in that action the appellants were made parties defendant. *Orme* v. *Northern Trust Co.,* 410 Ill. 354, 102 N.E.2d 335. On March 29, 1949, and on April 27, 1949, the Attorney General of the United States, acting under the authority of the Trading With The Enemy Act, 50 U.S.C.A. App. § 1 *et seq.,* issued orders vesting in him the interests which appellants had in the trust created by the Bigelow will. The Attorney General was substituted for appellants as defendant in the litigation concerning the construction of the will, and the order permitting the substitution, on the basis of appellants' interest in the trust having vested in the Attorney General, was sustained by the Supreme Court of this state. *Orme* v. *Northern Trust Co., supra.* In other words, the Supreme Court of Illinois held that the interest of the Attorney General was such as to warrant his substitution

as defendant in the *Orme* litigation. Appellants were not removed from that case, however, but continued as defendants therein. The Supreme Court of the United States denied defendants' petition for a writ of certiorari, 343 U.S. 921, 72 S.Ct. 677, 96 L.Ed. 1334. A final decree in the will construction suit was entered in 1959 and the decree was affirmed by this court (29 Ill.App.2d 75, 172 N.E. 2d 413) and by the Supreme Court of Illinois (25 Ill.2d 151, 183 N.E.2d 505).

The present action was commenced by the trustee in 1950 for instructions with respect to the administration of the estate and for a determination of the identity of the parties entitled to share in the distribution of the principal of the trust. The Attorney General answered, claiming the Louise De Haven share by reason of the vesting orders. The instant litigation made little progress through the years, since all parties awaited the outcome of the *Orme* litigation. After the mandate of the Supreme Court of Illinois was filed in that suit, appellants moved herein for summary judgment, claiming that the Attorney General had no present interest in the Louise De Haven share because that interest had been divested by the enactment of the divestiture amendment. Trading With The Enemy Act, sec. 40, 50 U.S.C.A. App. § 41. The motion for summary judgment was denied, a final decree was entered and this appeal ensued.

The divestiture amendment became effective on October 22, 1962, and the pertinent part thereof is as follows:

> "Section 40(a) * * * all rights and interests of individuals in estates, [and] trusts * * * vested under this Act after December 17, 1941, which have not become payable or deliverable to or have not vested in

possession in the Attorney General prior to December 31, 1961, are divested: *Provided*, That the provisions of this section shall not affect the right of the Attorney General to retain all such property rights and interests and to collect all income which is payable to or vested in possession in him prior to December 31, 1961." 50 U.S.C.A. App. sec. 41(a).

Appellants contend that the Louise De Haven share was neither "payable or deliverable" to the Attorney General nor vested in his possession on the cutoff date, because on that date the *Orme* litigation was still pending and undetermined by the Supreme Court of Illinois and hence there was no binding judicial declaration of the rights of the parties prior to that date. To pass upon this contention, it is necessary to determine the types of interests Congress intended to be divested, and for this purpose a review of the legislative history of the enactment is required.

Following the initial passage of the Trading With The Enemy Act, numerous bills were introduced in Congress providing that the property seized under that act should be used to indemnify citizens of the United States who had suffered war damage. The War Claims Act of 1948 (50 U.S.C.A. App. § 2001 *et seq.*) satisfied a limited number of these claims and provided that the proceeds of vested enemy assets be deposited in a War Claims Fund. A section of that act prohibited the return of vested German and Japanese property to its former owners. In subsequent treaties with Germany and Japan, the United States agreed to forego any claims for war damage against the current production of those countries, and our former enemies agreed that their former assets could be used to pay war damage claims. In 1958 legislation was introduced to provide for a partial return of vested property as an act

of grace, but it failed of enactment. No such legislation was passed until 1962, when Public Law 87-846 amended the War Claims Act and added Section 40(a) to the Trading With The Enemy Act.

The 1962 amendments authorized the Foreign Claims Settlement Commission to determine the validity and amount of claims and authorized the Attorney General to pay into the Treasury for deposit to the War Claims Fund the sums derived from property vested in him under the Trading With The Enemy Act. On June 30, 1962, there was available for transfer to the War Claims Fund, after final liquidation of the Office of Alien Property, an estimated balance of one hundred million dollars. The amendment did not provide generally for a return of vested property to enemy nationals and left unchanged the provision which prohibits such a return. 50 U.S.C.A. App. § 39.

In the first session of the 87th Congress the House of Representatives passed various bills amending the Trading With The Enemy Act which contained no divesting provisions. In the Senate, however, bills were introduced to accomplish divestment of interests in estates and trusts established by American citizens. Senate Bill 291 proposed an amendment which would have divested the Attorney General of any unliquidated interest in any trust the corpus of which was composed of assets "*provided* by any individual who at the time of the creation of such trust was a citizen of national of the United States, which has been vested under this Act after December 17, 1941, and has not been *reduced to possession* by any officer of the United States. * * *" (Emphasis added.)

In response to a request by the Senate, the Deputy Attorney General protested the use in the proposed act of the phrase "reduced to possession," and urged the adop-

tion of language now incorporated in Section 40 of the Trading With The Enemy Act; that is to say, the phrase "reduced to possession" was changed to "payable or deliverable to or have not vested in possession." See generally, Domke, "The War Claims Act of 1962." Am.J. Int.L. 354 (1963).

"Reduction to possession" is defined in Black's Law Dictionary as "conversion of a right existing as a claim into actual custody and in enjoyment," and the Attorney General correctly pointed out that the use of the original language would cause the return of interests due but not yet collected. The phrase "vested in possession" is well understood as meaning "a right of present enjoyment." *Smith* v. *West,* 103 Ill. 332; *People* v. *Strom's Estate,* 363 Ill. 241, 2 N.E.2d 94; *Golladay* v. *Knock,* 235 Ill. 412, 85 N.E. 649; Fearne on Remainders, p. 1. Contrasted with these terms is the phrase "vested in interest," which means a present fixed right of future enjoyment. Thus any given interest may first be vested in interest (as a vested remainder prior to termination of the preceding estate), then vested in possession (as a vested remainder upon termination of the preceding estate), and finally reduced to possession (as when distribution is made by the trustee). It is clear that the legislative intent was to divest the Attorney General where he was merely vested in interest, but not where he was vested in possession.

The most recent case on the subject is *Estate of Hogemann,* 45 Cal.Rptr. 149, 403 P.2d 405, Supreme Court of California, July 2, 1965, reversing a decision by the appellate court (41 Cal.Rptr. 246). In that case the trial court held that under California law, a legacy was not payable or distributable prior to the probate court's decree of distribution, and was not vested in possession and hence that

the divestiture act applied. The appellate court affirmed. The reasoning was that the legatee had no action against the executor or administrator for recovery until a decree of distribution was made effective. The decision was rendered during the pendency of the case in this court and was brought to our attention by the Attorney General in his brief. He argued that the availability of a suit against the trustee distinguishes the instant case from the *Hogemann* case. Appellants, on the other hand, argued that the *Hogemann* case was "strikingly similar to the case at bar, and deserves the careful consideration of this Court," urging, however, that they had a much clearer case for divestiture than the *Hogemann* case. After the briefs had been filed in the instant case, the California Supreme Court reversed the appellate court and held that the divestiture act did not apply. The court referred to the legislative history which we have before discussed and said (45 Cal. Rptr. at 151-152, 403 P.2d at 407-408):

> "The language proposed by the Department of Justice to effect this change was adopted verbatim by Congress in the final form of Public Law 87-846. Yet under respondents' view this deliberate alteration of wording would serve only the trivial purpose, in the present context, of guarding against the possibility that the cutoff date might occur for some estates during the brief period between entry of the decree of distribution and the writing of a check by the administrator in accordance with that decree. Nothing in the language or history of the statute compels such a narrow limitation of its scope."

In a memorandum furnished to this court subsequent to the decision of the Supreme Court in the Hogemann case, appellants point out a number of distinctions between the two cases. The main question involved, however, was the

meaning of the phrases "payable and deliverable," and "vested in possession," and in that respect the California court's decision is persuasive here.

There are a number of decisions of the United States Supreme Court, United States v. Jones, 236 U.S. 106, 35 S.Ct. 261, 59 L.Ed. 488 (1915); McCoach v. Pratt, 236 U.S. 562, 35 S.Ct. 421, 59 L.Ed. 720 (1915); Simpson v. United States, 252 U.S. 547, 40 S.Ct. 367, 64 L.Ed. 709 (1920); Kahn v. United States, 257 U.S. 244, 42 S.Ct. 85, 66 L.Ed. 215 (1921); Woerishoffer v. United States, 269 U.S. 102, 46 S.Ct. 33, 70 L.Ed. 180 (1925), which have construed the words "absolutely vested in possession or enjoyment" as contained in an act which repealed an inheritance tax levied during the Spanish-American War. These cases relate to the time, manner and conditions under which a probate estate may be distributed, rather than to rights accruing to remaindermen of a trust. Here, the only period of time required to pass before the remainder interest under the Bigelow will became vested in possession was the lifetime of the last life tenant.

Appellants argue vigorously that the Orme litigation prevented the Attorney General from being vested in possession of the Louise De Haven share on December 31, 1961 (on which date the Orme appeal was pending in the Illinois Supreme Court) because that share was being claimed in toto by one party to the suit, was also being claimed partially by another, and the scope of the vesting order was still in dispute. They claim that vesting did not occur until there was a binding declaration of rights by the Illinois Supreme Court. They point out that various orders entered in the Orme suit stayed distribution of the share pending a final order in this proceeding. Appellants concede that had there been no litigation, the Louise De Haven

share would have vested in the possession of the Attorney General upon the death of the last Bigelow grandchild in 1951.

The argument of appellants is based on what we consider to be a false premise; namely, that it was the decree in the Orme case which *created* the rights of the various parties. On the contrary, the rights and status of the parties were created by the Bigelow will and were fixed as of the time the last grandchild died. The Orme case so declared. Under common usage, an interest ceases being a remainder or a future interest and becomes a present interest upon termination of the precedent estate. The right of possession and of present enjoyment accrue at that time. The construction of the instrument creating the right may require the aid of a court, and litigation may postpone the actual custody or enjoyment of the right and may be necessary to determine the identity of the holder of the right, but the right of present enjoyment is fixed when the precedent estate determines. There is nothing in the language or legislative history of Section 40(a) which would make it appear that Congress intended otherwise than to give the phrase "vested in possession" its ordinary meaning in the law. Appellants' argument would require us to find that Congress intended "vested in possession" to mean "a right of present enjoyment, to the realization of which there are no legal obstacles." The logical conclusion to this approach would mean that any action, no matter how frivolous or ill-conceived, which had the effect of delaying distribution beyond the cutoff date would be sufficient to divest the Attorney General. It is not conceivable that Congress would so intend.

It is our conclusion that Section 40(a) of the Trading With The Enemy Act preserves in the Attorney General those interests with respect to which the right to possession had accrued, even though actual reduction to possession had been delayed by litigation involving the title to such interest, and that the interest of appellants in the Louise De Haven share was vested in possession in the Attorney General on December 31, 1961 within the meaning of that act.

Appellants also charge error in the chancellor's order approving payment to the trustee out of the trust funds of a distribution or termination fee of $10,672. As we have found that the title to the interest in question is in the Attorney General and as he has not objected to this fee, it is not necessary for us to consider this phase of the case.

The decree is affirmed.

Decree affirmed.

Dempsey, P.J., and Sullivan, J., concur.

APPENDIX B

The Affirming Order Of The Illinois Appellate Court, First District.

The Northern Trust Company, a corporation of Illinois, as Trustee Under the Last Will and Testament of Louisa G. Bigelow, Deceased,
Appellee

No. 49921 vs.

Constance Biddle, et al, etc.,
Defendants below,

Attorney General of the United States of America,
Defendant below, Appellee

On appeal of Adelheit von Hardenberg and Irmgard von Alten,
Defendants below, Appellants

} Appeal from the Circuit Court of Cook County

AFFIRMING ORDER.

The decree of the Circuit Court of Cook County is AFFIRMED and The Northern Trust Company, etc., Certain Appellee, recover costs from Appellants,

Execution may issue.

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FILED
JUL 15 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 256

ADELHEIT VON HARDENBERG AND
IRMGARD VON ALTEN,
Petitioners,

vs.

NICHOLAS DEB. KATZENBACH, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

MEMORANDUM OF RESPONDENT, THE NORTHERN TRUST COMPANY, ETC., IN ANSWER TO PETITION FOR WRIT OF CERTIORARI.

LESTER G. BRITTON,
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Of Counsel:
SCHIFF HARDIN WAITE DORSCHEL & BRITTON.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

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ADELHEIT VON HARDENBERG AND
IRMGARD VON ALTEN,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

MEMORANDUM OF RESPONDENT, THE NORTHERN TRUST COMPANY, ETC., IN ANSWER TO PETITION FOR WRIT OF CERTIORARI.

The Northern Trust Company, as trustee of property held by it in trust under the Will of Louisa G. Bigelow, deceased, to which petitioners and the Attorney General of the United States have advanced conflicting adverse claims, occupies a role similar to that of a stakeholder. On April 30, 1964, The Northern Trust Company's report and accounting to the date of December 31, 1963, was approved by the trial court in its final decree (A. 168); and pursuant thereto all of the then remaining distributable

trust property (with the exception of that which is claimed adversely by the petitioners and the Attorney General) was distributed to the parties entitled thereto. It now appears that the last of a series of substantive questions concerning the rights of claimants to the *corpus* of the Bigelow Trust may soon be resolved by this Court's disposition of the petition before it.

As trustee, The Northern Trust Company neither supports nor opposes the petition, since the result will be no more than the relief which it prayed for in its original complaint, *viz.*, a determination and adjudication of "the interests and identities of the several parties who are presently entitled to share in the income, and, upon termination, in the principal of the Bigelow Trust." (A. 28.)

Respectfully submitted,

LESTER G. BRITTON,
W. DONALD MCSWEENEY,
Counsel for Respondent, The Northern Trust Company, As Trustee under the Will of Louisa G. Bigelow, deceased.

Of Counsel:
SCHIFF HARDIN WAITE DORSCHEL & BRITTON.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 256

ADELHEIT VON HARDENBERG AND IRMGARD VON ALTEN, PETITIONERS

v.

NICHOLAS DEB. KATZENBACH, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the Circuit Court of Cook County, Illinois, denying petitioners' motion for summary judgment without opinion, is unreported. The opinion of the Appellate Court of Illinois, First District (Pet. App. 1–10), is reported at 65 Ill. App. 2d 253, 212 N.E. 2d 694. The decision of the Supreme Court of Illinois, denying leave to appeal without opinion, is unreported.

JURISDICTION

The opinion and order of the Illinois Appellate Court were entered December 9, 1965. Petitioners' timely petition for leave to appeal to the Illinois Su-

225-219—66

preme Court was denied on March 22, 1966. The petition for a writ of certiorari was filed on June 20, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

A 1962 amendment to the Trading with the Enemy Act divested the Attorney General of previously vested property which had not become "payable or deliverable to or * * * vested in possession in" him prior to December 31, 1961. Petitioners' remainder interest in a testamentary trust was vested by the Attorney General in 1949, and the interest became distributable under the terms of the trust in 1951, upon the death of the last life tenant. The question presented is whether litigation which subsequently ensued concerning distribution of the trust—which did not terminate until after December 31, 1961—divested the Attorney General under the 1962 amendment.

STATEMENT OF FACTS

In 1949, the Attorney General, acting under the Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. 1 *et seq.*, vested petitioners' remainder interest in a trust created by the will of Louisa Bigelow. 14 Fed. Reg. 1660. In 1951, Sarah de Haven, the last of the three life tenants under the terms of the trust, died (R. 45, 55).[1] Under the terms of the trust, the corpus thereupon became distributable to the children of the life tenants, the class to which petitioners belonged (R. 30–31). Actual distribution, however,

[1] "R." refers to the Abstract of Record in the Appellate Court.

did not occur. Instead, protracted litigation ("the *Orme* case") ensued, as a result of three claims: (1) Petitioners claimed that the Attorney General's vesting order was invalid and that accordingly the remainder should be paid to them; (2) Eugene Orme, claiming under the will of one of the life tenants, urged that the Rule in Shelley's case had vested a fee simple in the trust property in the life tenants, thus destroying petitioners' remainder; (3) Raymond de Haven, who had been adopted by one of the life tenants, claimed the right to share equally with petitioners. The litigation is more fully described in the opinions in *Orme* v. *Northern Trust Co.*, 410 Ill. 354, 102 N.E. 2d 335, certiorari denied, 343 U.S. 921, and *Orme* v. *Northern Trust Co.*, 25 Ill. 2d 151, 183 N.E. 2d 505, certiorari denied, 371 U.S. 935.

Public Law 87–846, passed in 1962, provided that interests in various types of property, including trusts, previously vested under the Trading with the Enemy Act, would be returned to their original owners if the interests had not become "payable or deliverable to or have not vested in possession in the Attorney General prior to December 31, 1961." 76 Stat. 1115, 50 U.S.C. App. 41 (Pet. 2). On December 31, 1961, the above described litigation was still in progress; the Attorney General's claim to the remainder interest had been sustained by the chancellor and by the Illinois Appellate Court, and an appeal was pending in the Supreme Court of Illinois. In 1962, the Supreme Court of Illinois affirmed the chancellor's decree, and this Court denied certiorari. *Orme* v. *Northern Trust Co.*, 25 Ill. 2d 151,

183 N.E. 2d 505 (1962), certiorari denied, 371 U.S. 935. The chancellor's decree stated that the remainder in question "became distributable to" the Attorney General "upon the death of Sarah de Haven [the last life tenant, who died in 1951]" (R. 136–137).

The chancellor thereafter rejected petitioners' contention that Public Law 87–846 required return of the remainder to petitioners, and ordered distribution of the property to the Attorney General. The Appellate Court affirmed, holding that the remainder interest became payable and deliverable to, and vested in possession in, the Attorney General in 1951, upon the death of the last life tenant:

> The argument of appellants is based on what we consider to be a false premise; namely, that it was the decree in the Orme case which *created* the rights of the various parties. On the contrary, the rights and status of the parties were created by the Bigelow will and were fixed as of the time the last grandchild died. The Orme case so declared. Under common usage, an interest ceases being a remainder or a future interest and becomes a present interest upon termination of the precedent estate. The right of possession and of present enjoyment accrue at that time. The construction of the instrument creating the right may require the aid of a court, and litigation may postpone the actual custody or enjoyment of the right and may be necessary to determine the identity of the holder of the right, but the right of present enjoyment

> is fixed when the precedent estate determines. * * *

(Pet. App. 9). The Supreme Court of Illinois denied leave to appeal.

ARGUMENT

1. As the Illinois Appellate Court held, the Attorney General's right to possession of the trust property here involved accrued in 1951, under the terms of the vesting order and the Bigelow will. It was then that the property became "payable or deliverable to" and "vested in possession in" the Attorney General. The fact that protracted litigation was thereafter necessary to vindicate the Attorney General's property right clearly did not affect the nature of the right or the date on which it accrued.[2]

2. Petitioners' contention (Pet. 17) that the 1962 amendment to the Trading with the Enemy Act "will to a large extent be nullified" by the holding below is incorrect. The holding below simply means that the Attorney General may retain property interests which were due and payable to him on or before December 31, 1961, but which had not been collected because of the pendency of litigation. The purpose of the legislation

[2] An analogy may be drawn to the case of a note which by its terms is payable to John Jones on January 1, 1951. John Jones may find it necessary to engage in years of litigation to vindicate his right to the proceeds of the note. Nevertheless, in common parlance, the note became "payable" to John Jones on January 1, 1951—not on whatever date a court judgment establishing Jones' rights becomes final.

was not to affect such property interests, but rather to cut off the vesting of income payments which were not yet due, and remainder interests where the intervening estate had not yet terminated.[3]

3. The holding of the court below is in accord with the decision of Supreme Court of California in *In re Estate of Hogemann,* 45 Cal. Rep. 149, 403 P. 2d 405, the only other judicial decision involving the relevant provision of Public Law 87–846. It is true that in *Hogemann,* which also held the statutory cut-off inapplicable, the litigation pending on the cut-off date did not involve any substantial contentions in opposition to the Attorney General's claim, whereas in the case at bar the questions in litigation on that date were, concededly, substantial. Neither the purpose of the 1962 amendment, however, nor common legal parlance,

[3] The letter of Deputy Attorney General (now Mr. Justice) White (reproduced at 108 Cong. Rec. 19228) explains the language of the 1962 amendment, which was drafted by the Department of Justice as a substitute for a bill which would have returned all vested property which the Attorney General had not "reduced to possession" by the cut-off date. S. 291, 87th Cong., 1st Sess. The letter states that a cut-off in vesting was needed because "with the passing years, the expense of collecting income payments and preserving remainder interests will become disproportionately large in relation to the value of the property to be taken in." The letter also states that the Department's proposed language—which Congress accepted—provides for the Attorney General's retention of "all interests that will have become due" by the cut-off date. Petitioners' remainder presents the familiar example of a property interest that became "due" years before it was, as a practical matter, collectible.

would hinge the ascertainment of the date on which a property interest becomes "payable" or "deliverable" or "vested in possession" upon a determination as to whether the questions involved in pending litigation were or were not substantial.

The decision below is also consistent with the decisions of this Court relied upon in the Petition (Pet. 15–22). In both *United States* v. *Jones,* 236 U.S. 106, and *McCoach* v. *Pratt,* 236 U.S. 562, the statutory cut-off date occurred shortly after the testator's death, during a period when State law barred the legatees from compelling any distribution of the estate (in order to give creditors time to present claims). Thus actual reduction to possession was forestalled by State law, not by pending litigation. Similarly, in *Uterhart* v. *United States,* 240 U.S. 598, the very terms of the will provided that the legatee had no right to possession until he reached the age of twenty-one, which occurred after the statutory cut-off date; thus the legatee's reduction to possession was barred by the very terms of the insrument creating his right, rather than by pending litigation. Finally, in *The Peggy,* 1 Cranch 64, this Court held that a ship was not "definitively condemned" within the meaning of a treaty until the lower court judgment of condemnation was affirmed on appeal. In that case, however, the property derived its "condemned" status from a trial court judgment, and the only question was the "definitiveness" of a trial court judgment being appealed. By contrast, because the property here derived its "pay-

able or deliverable to or * * * vested in possession" status from the terms of the Bigelow trust, no court judgment was necessary.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] The decision below has, in addition, little prospective importance. The statute in question, creating the December 1961 cut-off date, was designed to terminate the vesting program under the Trading with the Enemy Act, and relatively few unresolved claims under the Act remain outstanding. On June 29, 1966, the President announced that the Office of Alien Property in the Department of Justice would close as of June 30, 1966. Remaining matters are to be handled by the part-time work of personnel in the Civil Division of the Department of Justice. As of April 30, 1966, there were pending some 50 administrative claims, 450 accounts, and 30 cases in litigation. See Report of Office of Alien Property—Message from the President, 112 Cong. Rec. 14095 (daily ed., June 30, 1966).

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